

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES L. LEMMONS**  
Claimant

VS.

**RYDER INTEGRATED LOGISTICS, INC.**  
Self-Insured Respondent

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Docket No. 1,036,335

**ORDER**

Respondent appealed the July 23, 2013, Order entered by Administrative Law Judge (ALJ) John D. Clark. Oral argument was set for November 5, 2013, but the parties waived oral argument and this matter was placed on summary docket. Jeffrey King of Salina, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of Board Member Seth G. Valerius.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

**RECORD**

The record considered by the Board consists of the transcript of the July 23, 2013, motion hearing and exhibit thereto, and the pleadings contained in the administrative file.

**ISSUES**

ALJ Clark assessed attorney fees and expenses against respondent for a total of \$4,561.19 (24.5 hours at \$150 per hour, or \$3,675, for attorney fees and \$886.19 for expenses).

Respondent requests the Board reverse the July 23, 2013, Order. Respondent contends claimant's counsel is not entitled to attorney fees related to a continuing attempt to receive payment on a medical bill previously deemed unauthorized by the Board. Respondent argues claimant's request for attorney fees after the ALJ, Board and Kansas Court of Appeals denied claimant's request for the payment of a pre-award medical bill is unreasonable and, therefore, not authorized by K.S.A. 44-536(g). Respondent argues ALJ

Nelsonna Potts Barnes, in her October 1, 2012, Order, specifically denied claimant's request for attorney fees associated with his appeal to the Kansas Court of Appeals

Respondent contends that if claimant is entitled to attorney fees, the fees submitted are not reasonable and the costs are not statutorily authorized because: (1) the time on claimant's attorney fee bill is overstated, (2) there is no statutory allowance under K.S.A. 44-510k for attorney fees related to preliminary hearings, (3) appellate court attorney fees and costs can only be ordered by the appellate courts, (4) claimant's request for costs is vague, (5) telephone costs are not included as a cost under K.S.A. 44-510k(c) and (6) postage is only allowed as a cost for service of process. Respondent's counsel requests attorney fees and expenses from claimant pursuant to K.S.A. 44-536a.

In an October 1, 2012, Order, ALJ Barnes awarded claimant attorney fees at the rate of \$175 per hour, because \$175 per hour was reasonable and customary, given the experience of claimant's attorney. Claimant, therefore, requests the Board modify ALJ Clark's Order to award attorney fees at the rate of \$175 per hour. Claimant also requests additional attorney fees for this appeal.

The issues before the Board on this appeal are:

1. Does K.S.A. 44-536(g) allow the ALJ to award claimant attorney fees and costs?
2. If so, are claimant's attorney fees and costs reasonable?
3. If the Board finds claimant is entitled to attorney fees and costs, what should be the hourly rate of claimant's attorney fees?
4. Is claimant entitled to additional attorney fees for this appeal?
5. If the Board finds claimant is not entitled to attorney fees, should the Board grant respondent's motion for attorney fees?

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

In 2010, claimant filed an Application for Post Award Medical asking that respondent pay a medical expense in the amount of \$9,959.78 incurred on May 21 and 22, 2008, at Wesley Medical Center. In that post-award medical proceeding, claimant did not request a preliminary hearing, but proceeded directly to a final hearing. The post-award medical hearing was held on September 22, 2011. In a March 1, 2012, Post-Award Medical award, ALJ Barnes denied claimant's request. The Board affirmed, as did the Kansas Court of Appeals. Claimant filed a motion with the Kansas Court of Appeals requesting the Court order respondent to pay claimant's attorney fees on appeal, but the motion was denied.

After the March 1, 2012, Post-Award Medical award was issued, claimant filed two Applications for Preliminary Hearing. On May 2, 2012, claimant filed a motion for attorney fees and expenses. The motion requested respondent pay \$410.26 in expenses and 75.7 hours of attorneys fees at the rate of \$175 per hour, or \$13,247.50, for services claimant's attorney provided from November 12, 2009, through March 23, 2012, in association with claimant's post-award medical proceeding. A preliminary hearing was held on September 4, 2012, consisting of oral argument by the parties. Claimant again requested that respondent be ordered to pay the Wesley bill.

In an October 1, 2012, Order, ALJ Barnes denied respondent's motion to dismiss claimant's application for preliminary hearing and again denied claimant's request for respondent to pay the Wesley medical bill. Claimant appealed and the Board affirmed. In a separate October 1, 2012, Order, ALJ Barnes awarded claimant \$436.26 in expenses and 41.4 hours of attorney fees at the rate of \$175 per hour, or \$7,245. In her Order, ALJ Barnes denied claimant's request for 34.3 hours of attorney fees related to claimant's appeal to the Kansas Court of Appeals. Respondent timely appealed the issue of attorney fees, but dismissed its appeal on December 11, 2012.

On June 28, 2013, claimant filed a motion with the Division seeking attorney fees and costs. Attached to claimant's motion was a bill requesting 24.5 hours of attorney fees at the rate of \$175 per hour, or \$4,287.50, and \$886.19 in costs. The period of time covered by the bill was August 11, 2011, through May 14, 2013. Of the costs, \$453.79 were costs paid by claimant's attorney to another attorney, John L. Carmichael, to assist with claimant's appeal to the Kansas Court of Appeals.

On July 23, 2013, ALJ Clark conducted a hearing on claimant's request for attorney fees. No testimony was taken and the only exhibit was an invoice for Mr. Carmichael's expenses. The ALJ's entire July 23, 2013, Order states: "Attorney fees are assessed against the Respondent for 24.5 hours at a rate of \$150.00 per hour, or \$3,675.00, plus expenses in the amount of \$886.19, for a total of \$4,561.19."

#### **PRINCIPLES OF LAW AND ANALYSIS**

Respondent first challenges the award of any attorney fees. Respondent argues that claimant's request for a post-award medical award and subsequently a post-award medical preliminary hearing order requiring respondent to pay a pre-award medical expense was not reasonable and is statutorily barred by K.S.A. 2007 Supp. 44-510k(c). Therefore, according to respondent claimant's request for attorney fees is unreasonable under K.S.A. 44-536(g).

K.S.A. 2007 Supp. 44-510k(c) states:

The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments

thereto. As used in this subsection, “costs” include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

In *Higgins*,<sup>1</sup> the Kansas Supreme Court stated, “The plain language of the first sentence of K.S.A. 2008 Supp. 44-510k(c) explicitly endows an ALJ with the discretion to grant attorney fees and costs to a workers compensation claimant in a post-award medical benefits proceeding.”

K.S.A. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

The last sentence of K.S.A. 44-536(g) clearly provides that if the services rendered by an attorney result in the denial of additional compensation, the director **may** authorize a fee to be paid by respondent. Thus, under K.S.A. 44-536(g), ALJ Clark had the discretion to grant claimant's request for attorney fees. ALJ Clark gave no explanation in his Order as to why he ordered payment of claimant's attorney fees at the rate of \$150 per hour and expenses. However, by awarding claimant costs and attorney fees ALJ Clark implied that claimant's request for post-award medical benefits, although denied multiple times, was reasonable.

In her October 1, 2012, Order regarding attorney fees, ALJ Barnes partially granted claimant's May 2, 2012, motion for attorney fees and expenses. ALJ Barnes specifically

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<sup>1</sup> *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 362, 204 P.3d 1156 (2009).

denied all attorney fees related to claimant's appeal to the Kansas Court of Appeals. Claimant's motion covered the period of time from November 12, 2009, through March 23, 2012. Respondent later voluntarily dismissed its appeal of the October 1, 2012, Order. This Board has no jurisdiction or authority to review the October 1, 2012, Order.

The itemizations of attorney fees and costs attached to claimant's May 2, 2012, and June 28, 2013, motions for attorney fees overlap from the periods of August 11, 2011, through March 23, 2012. The entries on both itemizations during the overlapping period are different – the entries on the May 2, 2012, itemization appear to be related to the Kansas Court of Appeals proceeding, while the June 28, 2013, itemization entries were for the post-award medical hearing.

No evidence was presented by claimant concerning the entries on the June 28, 2013, itemization. Consequently, the Board does not know why the entries from August 11, 2011, through March 23, 2012, that appear on the June 28, 2013, itemization were not on the May 2, 2012, itemization. The Board can only conclude that ALJ Barnes' October 1, 2012, Order granting claimant's request for attorney fees applied to all legal services claimant's attorney provided through March 23, 2012. Claimant should have included all of his legal services through March 23, 2012, on the itemization attached to his motion for attorney fees filed on May 2, 2012. The Board declines to award claimant additional attorney fees for the time period covered by ALJ Barnes' October 1, 2012, Order. Therefore, claimant's request for additional attorney fees from August 11, 2011, through March 23, 2012, is denied. Thus, 10.7 hours of attorney fees are disallowed.

Respondent asserts it should not be required to pay any of claimant's attorney fees and costs associated with his appeal to the Kansas Court of Appeals.

Supreme Court Rule 7.07 (2012 Kan. Ct. R. Annot. 66-67), in part, states:

**(b) Attorney Fees.**

(1) **Generally.** An appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees.

(2) **Motion for Attorney Fees.** A motion for attorney fees on appeal must be made under Rule 5.01 and be filed not later than 14 days after oral argument. If oral argument is waived, the motion must be filed not later than 14 days after the day argument is waived or the date of the letter assigning the case to a non-argument calendar, whichever is later. An affidavit must be attached to the motion specifying:

(A) the nature and extent of the services rendered;

(B) the time expended on the appeal; and

(C) the factors considered in determining the reasonableness of the fee. (See KRPC 1.5 Fees.)

Supreme Court Rule 7.07 (2012 Kan. Ct. R. Annot. 66-67) sets forth the specific procedure for requesting attorney fees for time spent before the appellate courts. The Kansas Supreme Court addressed Rule 7.07 in *Evans*.<sup>2</sup>

In *Evans*, the plaintiff filed a motion for additional attorney fees incurred in connection with the appeal. In its decision, the Court of Appeals remanded the case to the district court for the determination of appellate attorney fees. The Supreme Court held this “is contrary to our Rule 7.07(b) (1990 Kan. Ct. R. Annot. 37).”<sup>3</sup> Even though the statute in question, K.S.A. 40-256, allowed for the trial court to award attorney fees for services “including proceeding upon appeal,” the Court in *Evans* held that civil appellate attorney fee awards are to be determined by the appellate court hearing the appeal. Motions for attorney fees incurred before the Court of Appeals should be determined by the Court of Appeals. The matter was then remanded to the Kansas Court of Appeals.

In *Hernandez*,<sup>4</sup> the Kansas Court of Appeals cited *Evans* and stated, “Here, we find that K.S.A. 44-536(g) does not expressly address or clearly imply that the Board has the authority to grant attorney fees for proceedings on appeal. Thus, we conclude that it would not be appropriate for us to supply a provision that is neither expressed nor clearly implied by the statute.” In applying the rulings in *Evans* and *Hernandez* to this matter, the Board finds that claimant's June 28, 2013, motion for attorney fees for the time spent before the Court of Appeals is a matter that only the Court of Appeals may consider. In fact, on June 5, 2013, the Kansas Court of Appeals denied claimant's motion for attorney fees on appeal. The Board does not have the authority to grant a request for attorney fees in an appellate matter.

The brief entries describing the legal services of claimant's attorney in the itemization make it difficult to determine which services were rendered in association with claimant's 2010 Application for Post-Award Medical, Applications for Preliminary Hearing and appeal to the Kansas Court of Appeals. After reviewing the June 28, 2013, itemization of legal services, the Board finds 2.5 hours of legal services provided on May 14, 2013, and all expenses totaling \$886.19, were related to claimant's appeal to the Kansas Court of Appeals and, therefore, are disallowed.

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<sup>2</sup> *Evans v. Provident Life & Accident Ins. Co.*, 249 Kan. 248, 815 P.2d 550 (1991).

<sup>3</sup> *Id.* at 265.

<sup>4</sup> *Hernandez v. State of Kansas*, No. 107,745, 2012 WL 4937630 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012), *rev. denied* (Aug. 29, 2013).

Respondent next contends there is no statutory authority under K.S.A. 2007 Supp. 44-510k for attorney fees related to preliminary hearings. Claimant's Application for Preliminary Hearing was filed after his Application for Post-Award Medical. Claimant proceeded under K.S.A. 2007 Supp. 44-510k and K.S.A. 44-534a. The October 1, 2012, Order was the result of a post-award preliminary hearing application for medical benefits. Therefore, the Board finds that under K.S.A. 44-536(g), the ALJ may award attorney fees and costs, if any, associated with claimant's post-award Application for Preliminary Hearing and subsequent appeal to the Board. The Board also notes that in its June 7, 2013, Order the Board found claimant did not frivolously file his Application for Preliminary Hearing, but rather made a good faith effort to be reimbursed for an unpaid medical expense.

Respondent, in its brief, asserts that many of the time entries in claimant's June 28, 2013, itemization of attorney fees are vague, ambiguous, lack sufficient detail and foundation and are unreasonable. Respondent's brief then discusses why several time entries are inaccurate. At the July 23, 2013, motion hearing, respondent argued that Exhibit 1, Mr. Carmichael's invoice, was vague and ambiguous and the June 28, 2013, itemization lacked sufficient detail to justify many of the time entries. ALJ Clark, by awarding claimant's request for attorney fees, apparently found claimant's time entries and descriptions sufficient. Therefore, the Board finds that respondent is required to pay claimant for 11.3 hours of attorney fees. That figure is calculated by subtracting 10.7 hours of services prior to March 23, 2012, and 2.5 hours for attorney fees associated with claimant's appeal to the Kansas Court of Appeals from the 24.5 hours claimant requested. As indicated above, the \$886.19 for expenses claimant requested is disallowed.

The next issue before the Board is whether claimant should receive \$175 per hour or \$150 per hour for the legal services of his counsel. In her October 1, 2012, Order, ALJ Barnes determined \$175 per hour was the reasonable and customary charge in the locality for an attorney who has practiced law for 28 years. At the July 23, 2013, motion hearing, claimant's attorney argued that \$175 per hour was previously approved by ALJ Barnes and was justified, but presented no testimony that \$175 was reasonable and customary. In past claims, the Board has ruled that \$150 per hour is a reasonable fee.<sup>5</sup> Therefore, the Board finds claimant is entitled to \$150 per hour for the services of his attorney.

Respondent asks the Board to award it attorney fees for this appeal. The Board declines to do so. Attorney fees in workers compensation cases are allowable only where expressly authorized by the Workers Compensation Act.<sup>6</sup> The legislature enacted K.S.A. 44-536 to provide for situations in which attorney fees are authorized under the Act. There are no sections of that statute which authorize assessment of respondent's attorney fees

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<sup>5</sup> *Hinson v. Perry-Lecompton Thriftway*, No. 1,041,697, 2013 WL 2455686 (Kan. WCAB May 17, 2013); *Finney v. Finn's Electric Co., Inc.*, No. 216,317, 2010 WL 3489633 (Kan. WCAB Aug. 31, 2010) and *Mills v. Express Communications*, No. 1,021,634, 2009 WL 1314313 (Kan. WCAB Apr. 24, 2009).

<sup>6</sup> *Lackey v. D & M Trucking*, 9 Kan. App. 2d 679, 687 P.2d 23 (1984).

as a sanction against the claimant. The general rule in this jurisdiction is that attorney fees and expenses of litigation incurred by a prevailing party are not chargeable as costs against a defeated party in the absence of a clear and specific statutory provision therefor.<sup>7</sup>

The Board also declines to award claimant attorney fees for this appeal. The Board has repeatedly ruled that any such request for fees must first be presented to the ALJ.<sup>8</sup>

**WHEREFORE**, the Board modifies the July 23, 2013, Order entered by ALJ Clark by finding that respondent is ordered to pay claimant 11.3 hours of attorney fees at the rate of \$150 per hour, or \$1,695. The \$886.19 for expenses claimant requested is disallowed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
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Honorable John D. Clark, Administrative Law Judge

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<sup>7</sup> *Walker v. Davis Van & Storage Co.*, 198 Kan. 452, 424 P.2d 473 (1967).

<sup>8</sup> *Davis v. Dodge House, Inc.*, No. 210,011, 2005 WL 600040 (Kan. WCAB Feb. 2005); *Kasiska v. Hunter Care Centers, Inc.*, No. 192,781, 1996 WL 580387 (Kan. WCAB Sept. 25, 1996) and *Tharp v. K. C. Gunite*, No. 187,952, 1996 WL 582659 (Kan. WCAB Sept. 19, 1996).